

NO. 49249-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL GREGORY MONTOYA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 16-1-00485-5

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether evidence of prior stalking behavior by Montoya, which was known to the present victim, was admissible on the essential element of reasonable fear in the present stalking prosecution?

2. Whether there was sufficient evidence to satisfy the essential element of the victim's reasonable fear?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Michael Gregory Montoya was charged by information filed in Kitsap County Superior Court with felony stalking. CP 1. The matter proceeded to trial under a first amended information that changed the date-range of the charge and changed the named victim from Arlene Stormo to Amy Leanne Stormo. CP 29.

The defense questioned Montoya's competence to stand trial. Western State Hospital was ordered to evaluate him. CP 8-14. A forensic evaluation found Montoya to be competent. CP 15-22. The trial Court entered an order finding him competent to stand trial. CP 23.

Montoya stipulated to a prior stalking conviction as predicate for the felony charge in the present case. CP 32. This stipulation was submitted in a bifurcated jury deliberation after the jury had determined

guilt on the general elements of stalking. 2RP 243. The bifurcation was ordered out of concern for the jury hearing of Montoya's prior stalking conviction. 1RP 29.

It was the case that Montoya's prior conviction for stalking had Rebecca Stormo as the victim. Amy Stormo knew of Montoya's stalking of her cousin Rebecca. 1RP 18. She knew that in the case with Rebecca the stalking had escalated to Montoya attempting to physically accost Rebecca. 1RP 25 (state's offer of proof). In large part, it was this knowledge of Montoya's behavior toward Rebecca that caused Amy to be so scared and concerned when Montoya started to target her. 1RP 25.

The issue first arose with regard to Montoya's motion to bifurcate. 1RP 13. Montoya was concerned that the prior stalking conviction would prejudice the jury but recognized that it was necessary proof as predicate for the felony charge in the present case. 1RP 13-14. In argument on the bifurcation issue, the state raised the concern that the prior stalking behavior is relevant to prove the element of Amy Stormo's reasonable fear of Montoya which was based on her knowledge of his behavior toward her family member. 1RP 18. Thus the state sought to admit both the fact of conviction and the facts underlying that conviction. 1RP 20. The defense argued that admission of the underlying facts would have a "super prejudicial effect" against Montoya. 1RP 26-27.

The trial court took pains to balance the interests of both parties. 1RP 24-25. The trial court ruled that testimony that Montoya had engaged in stalking behavior against Amy's family member would be allowed on the issue of the reasonableness of Amy's fear. 1RP 29. The trial court bifurcated evidence of the actual conviction. *Id.* Upon further discussion, the trial court summarized its ruling

Well, I want to -- the victim to be allowed to testify that -- because it goes directly to her reasonable fear. She reasonably feared the defendant's text because of the prior behavior he engaged with the cousin. But I don't want the jury at that time to know it was a prior felony stalking conviction.

1RP 31. The issue was again subject to discussion later in the case when the trial court reconsidered the use of the word "stalking." 1RP 44. The court was concerned because the word is the name of a crime. *Id.* The trial court expressly stated that it was attempting to balance the "probative versus prejudicial value." 1RP 46.

Montoya was found guilty as charged. CP 52. By special verdict, the jury found that Montoya knew or should have known that the victim was afraid, intimidated, or harassed even if Montoya did not intend to place her in fear or to intimidate or harass her.¹ CP 53.

Montoya received a standard range sentence. CP 57. The present appeal was timely filed. CP 68.

¹ The jury was not unanimous on the question of whether Montoya intended to frighten,

B. FACTS

On April 9, 2016, Montoya had driven from his residence in Lynnwood to get coffee at Stormy Espresso. 1RP 161.² Montoya said he was on the way to Mason County. 1RP 161. The Stormy Espresso is not on the way from Lynnwood to Mason County but Montoya had no explanation for the detour. 1RP 161-62. Montoya was aware that “a Stormo might be working there.” 1RP 162.

The Stormy Espresso is owned by Arlene Stormo and her daughter Amy.³ 2RP 167. Neither Arlene Stormo nor Amy Stormo had any sort of a relationship with Montoya. 2RP 168. Montoya’s visit to the coffee stand on April 9 was the second in several months. 2RP 169. During a previous visit, Montoya had left his name and phone number on the receipt. 2RP 170 (See state’s exhibit 3, CP 91). On April 9, Montoya asked Arlene Stormo about the girls, referring to Amy Stormo and Arlene’s niece Becky. 2RP 172. Arlene described his demeanor on April 9 as “looking around wildly. His eyes were darting different places. He appeared very agitated, nervous.” 2RP 171.

intimidate, or harass.

² Trial transcribed in two volumes, which will be referred to herein as 1RP and 2RP.

³ There are three Stormos in the record, Amy, Arlene, and Rebecca (Becky), reference to any one of them by first name is for clarity and no disrespect is intended.

Amy Stormo became aware of Montoya in late 2008. 2RP 174. Amy's cousin is Rebecca Stormo whom Arlene Stormo had identified as her niece Becky. 2RP 174. Montoya had previously engaged in "stalking behavior" toward Becky. 2RP 175. Amy's personal contacts with Montoya started when he sent her a text message. 2RP 175. She does not know how he got her number. Id. This occurred in 2011 or 2012. 2RP 176. Amy did not know who the text was from, called the number, and the voicemail said Montoya. Id. She recognized the name from his behavior toward her cousin. Id. In 2011 or 2012, Amy received a few text messages from Montoya. 2RP 177. In response to these messages Amy called the police and the Stormos installed a security system with eight cameras and a panic button at the coffee stand. Id.

Amy responded to Montoya's continuing messages by sending back to him and telling him to leave her and her family alone. 2RP 178. Eventually, Amy sought and was granted a protection order against Montoya. Id. She had no contact with Montoya during the year that the protection order was in force. 2RP 179. She was unable to renew the protection order and soon thereafter Montoya started posting to the business's Facebook page. Id. They received two posts in 2015 (hard copies admitted as state's exhibits 1 and 2, CP 87 and 89). 2RP 180. Montoya wrote: "Mike Montoya wants to talk to Beckies his godsister

425 236 0023 jesus forward to my sister the billionaire am loved her.” CP 87. And, “I wanna talk to Becki stormo or Amy stormo 425 236 1479 its Beckies famous rapper godbrother please jesus.” CP 89. These posts made Amy “scared and worried.” 2RP 181.

Following these posts, Montoya had visited the coffee shop. 2RP 181. Montoya discussed this visit on Facebook:

yesterday I went to port orchard and stopped by at stormy espresso to give this lady my number to give to Amy stormo to call me and I know she got it and tried to call me but I’m not getting calls or texts because the illuminati has my phone tapped and they block my phone calls cause they don’t want me to have any friends.

CP 93 (states exhibit 4). And,

I got 25 million dollars to give to every stormo family member if amy calls me and takes me to get my money with none of the illuminati initiation bullshit envolved to all you non believers or people that don’t cooperate with me and think I’m crazy may you remain oblivious to the truth and live like she Montoya over and out.

CP 95 (state’s exhibit 5).

Again, these statements by Montoya made Amy scared and worried—she was afraid he would start escalating. 2RP 183. In response, Amy sought and received another protection order. Id. But Montoya was never served with this second protection order. Id.

Then, several weeks later, Montoya again came to the coffee shop. 2RP 183-84. Amy was not present but her mom called and “hysterically”

told Amy of the visit. 2RP 184. All these contacts made Amy scared and she wanted him to stop and leave her and her family alone. Id.

III. ARGUMENT

A. EVIDENCE OF THE PRIOR STALKING BEHAVIOR OF THE DEFENDANT TOWARD A FAMILY MEMBER OF THE PRESENT VICTIM, KNOWN TO THE PRESENT VICTIM, IS ADMISSIBLE TO PROVE THE NECESSARY ELEMENT OF REASONABLE FEAR OF THE PRESENT VICTIM.

Montoya argues that the trial court erred in allowing evidence of Montoya's previous stalking behavior targeting Rebecca Stormo. This claim is without merit because the previous stalking behavior was admissible on the essential element of the reasonableness of the present victim's fear of Montoya. The trial court carefully considered the probative value of the evidence and carefully limited any prejudicial effect on Montoya's case. Moreover, the fact of prior conviction was hidden from the jury by bifurcation of the trial until after they had found Montoya guilty; at which point the question of the predicate prior was submitted and Montoya stipulated to the required predicate conviction.

A trial court's decision to admit ER 404 (b) evidence is reviewed for abuse of discretion. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007) (En Banc). The trial court's discretion is abused if its ruling is based on untenable grounds or untenable reasons. Id. ER 404 (b)

evidence is any evidence that is offered to “show the character of a person to prove the person acted in conformity” with that character. *Id.*, *citing State v. Everybodytalksabout*, 145 Wn.2d 456, 466, 39 P.3d 294 (2002). But the rule does not “deprive the State of relevant evidence necessary to establish an essential element of the case.” *Id.* Thus, “[i]f the evidence is offered for a legitimate purpose, the exclusion provision of ER 404 (b) does not apply.” *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995) (En Banc).

In order to admit 404 (b) evidence for a purpose other than to show propensity to commit crimes, the trial court engages an analysis that includes

(1) identify the purpose for which the evidence is sought to be introduced, (2) determine whether the evidence is relevant to prove an element of the crime charged and (3) weigh the probative value of the evidence against its prejudicial effect. Additionally, the party offering the evidence of prior misconduct has the burden of proving by a preponderance of the evidence that the misconduct actually occurred.

Lough, 125 Wn.2d at 853.⁴ The record in this case is clear that the trial court knew the evidence was offered for the purpose of proving the reasonableness of the victim’s fear, that the question of the reasonableness of the victim’s fear was an element of the offense of stalking, and that the

⁴ It should be noted that the defense here did not request a limiting instruction. *See State v. Gresham*, 173 Wn.2d 405, 269 P.3d 207 (2012) (limiting instruction need not be given if not requested).

trial court engaged at length in balancing probative value against prejudicial effect. Further, no argument was asserted by the defense that the prior misconduct did not occur but since the state stood ready to prove the prior stalking conviction, it is shown that proof of the actual misconduct could have easily been proven by a preponderance.⁵ In this case, then, the trial court conducted the proper inquiry.

Title 9A.46 RCW, the statutory provision relating to harassment and stalking, was enacted because

The legislature finds that the prevention of serious, personal harassment is an important government objective. Toward that end, this chapter is aimed at making unlawful the repeated invasions of a person's privacy by acts and threats which show a pattern of harassment designed to coerce, intimidate, or humiliate the victim.

The legislature further finds that the protection of such persons from harassment can be accomplished without infringing on constitutionally protected speech or activity.

RCW 9A.46.010. The various elements of stalking were stated in the “to convict” instruction. CP 48 (instruction 13). The issues raised by Montoya focus on the second and third elements, to wit, “that Amy Stormo reasonably feared that the defendant intended to injure her or another person,” and that “the feeling of fear was one that a reasonable person in the same situation would experience under all the circumstances.” *Id.*

⁵ The defense raised no argument that the prior behavior did not occur. *See State v. Binkin*, 79 Wn. App. 284, 290, 902 P.2d 673 (1995) (evidentiary hearing regarding whether bad act actually occurred not necessary if existence of prior bad act not

Elements two and three constitute that the victim must be subjectively in fear and that that subjective fear be objectively reasonable. *See State v. Ragin*, 94 Wn. App. 407, 411, 972 P.2d 519 (1999). In the first issue, Montoya argues that his previous stalking behavior should not have been admitted as proof of that element and in the second issue he argues that the state's proof was insufficient to establish that element beyond a reasonable doubt.

On this first issue, Montoya submits that it was error for the trial court to allow Amy Stormo to say that Montoya had engaged in "stalking behavior" toward her cousin Rebecca Stormo. Then, Montoya argues that because the details of that "stalking behavior" were not admitted, the previous stalking behavior could serve as forbidden propensity evidence only. Brief at 11. The invited error doctrine "prohibits a party from setting up an error at trial and then complaining of it on appeal." *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). Here, Montoya's trial counsel argued strenuously that his client could not receive a fair trial if the underlying facts of the previous stocking were admitted. 1RP 26-27. The trial court ruling balanced this argument against the state's need to prove the reasonableness of Amy Stormo's fear. 1RP 28-29. The exclusion of the underlying facts was thus invited by Montoya and this

contested).

portion of his appellate argument should carry no weight.

But the state likely should have been allowed to elicit those underlying facts. *See e.g. State v. Delgado*, 2017 WL 715161 (Div. III, February 23, 2017) (UNPUBLISHED AND UNBINDING) (“the State presented evidence of occasions before and during the relevant charging period when Mr. Delgado physically and verbally assaulted [the victim]” on the issue of reasonable fear). In a harassment prosecution, the state is also required to establish that the victim reasonably feared that the defendant’s threat will be carried out. RCW 9A.46.020 (1) (b). In a prosecution for harassment, the trial court did not abuse its discretion by admitting a prior threat to kill the victim’s unborn baby on the issue of reasonable fear. *State v. Binkin*, 79 Wn. App. 284, 291, 902 P.2d 673 (1995), *rev denied* 128 Wn.2d 1015 (1996), *abrogated on other grounds*, *State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). The primary reason for this holding was that “[t]he evidence of the prior threat was probative of and necessary to prove the victim’s state of mind in order to establish that her fear that he would carry out the threat was reasonable.” *Id.*; *see also State v. Barragan*, 102 Wn. App. 754, 759, 9 P.3d 942 (2000) (in harassment prosecution, evidence of defendant’s prior assaults, known to the victim, admissible on issue of reasonable fear that threat would be carried out).

In the present case, the evidence allowed was similarly necessary to prove Amy Stormo's state of mind in order for the state to prove the essential element of her fear and the reasonableness of that fear. In fact, in light of the cases above cited, it appears that the trial court may have been too solicitous of Montoya's concerns about prejudice. By offer of proof it was established that Montoya had engaged in an escalating course of conduct toward Rebecca Stormo that culminated in an attempted physical assault. 1RP 25; *see State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002) (trial court may rely on proponent's offer of proof in considering admissibility). This was precisely Amy Stormo's fear and concern when Montoya began to target her for his unwanted advances. But out of an abundance of caution, that included carefully weighing the probative value versus prejudicial impact question, the trial court suppressed this relevant and highly probative evidence.

Montoya got more ER 403 protection from the trial court than was warranted under the circumstances. There was no abuse of discretion and this claim fails.

B. A STALKING CONVICTION DOES NOT REQUIRE THAT THE VICTIM FEAR ACTUAL PHYSICAL INJURY AND THE PRESENT VICTIM ESTABLISHED HER FEAR AND THE JURY FOUND THAT THE FEAR WAS REASONABLE.

Montoya next claims that there was insufficient evidence to sustain conviction on the element of Amy Stormo's reasonable fear. This claim is without merit because Montoya misapprehends the meaning of the statutory word "injury" and Amy Stormo's testimony established that she was afraid of Montoya and that such fear was reasonable under the circumstances.

It is well settled that

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt. On appeal, we draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences therefrom. We will reverse a conviction for insufficient evidence only when no rational trier of fact could have found that the State proved all of the elements of the crime beyond a reasonable doubt. In evaluating the sufficiency of the evidence, circumstantial evidence is as probative as direct evidence.

State v. Garbaccio, 151 Wn. App. 716, 742, 214 P.3d 168 (2009) *rev denied* 168 Wn.2d 1027 (2010) (internal citation omitted). Montoya's argument fails to surmount this very high standard.

Montoyas' argument fails in large part because he errs in asserting

that the statute requires that Amy Stormo “reasonably feared *bodily injury*.” Brief at 15 (emphasis added). And again where he asserts that the contacts alleged “did not include anything that would make a reasonable person *fear bodily injury*.” Brief at 16 (emphasis added). No authority is cited for this editorial on the stalking statute. This is because the assertion that bodily injury is required is simply wrong. The statute in question requires neither threat of physical violence nor actual physical violence for conviction.

In *State v. Askham*, 120 Wn. App. 872, 86 P.3d 1224 (2004) *reversed* 152 Wn.2d 1032 (2004), the Court considered a challenge to the sufficiency of the evidence in a stalking prosecution. There, the trial court found guilt because the defendant’s course of conduct resulted in the victim being “reasonably placed in fear that the person intended to injure his livelihood and reputation.” *Id.* at 882. This finding was affirmed because “[w]e will affirm findings that the victim experienced substantial emotional distress and that the course of conduct would have caused substantial emotional distress to a reasonable person so long as substantial evidence supports these findings.” *Id.* at 883.

The *Askham* Court’s analysis included that the stalking statute’s use of the term “harassment” was imported from, and had the same meaning as, the term from the civil unlawful harassment statute (RCW

9A.46.110 (6) (b)).⁶ *Id.* at 882; *accord State v. Kintz*, 169 Wn.2d 537, 546, 238 P.3d 470 (2010). In the unlawful harassment statute, the definition includes that “[t]he course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress.... *Id.*; *see also State v. Kintz, supra* at 556 (affirming stalking conviction because defendant’s behavior would cause a reasonable person substantial emotional distress and in fact did so). The jury in the present case was instructed on the definition of harassment. CP 44 (instruction #9). There is no requirement under the stalking statute that the “injury” feared entail physical assault. And, here, Amy Stormo testified to just this sort of distress.

The element is about subjective fear and the objective reasonableness of that fear. It is not required that the victim fear assault, kidnapping, rape, or robbery—it is not required that the “injury” she fears be a particular action or crime. In *State v. Ainslie*, 103 Wn. App. 1, 11 P.3d 318 (2000), defendant challenged the sufficiency of the evidence on the reasonable fear element of a stalking prosecution. Evidence was sufficient where

An unknown man repeatedly parked within sight of a 14-year-old girl. While she was walking alone, the girl witnessed the man exit and stand near his car. And even

⁶ In fact, stalking is denominated a “harassment” crime. RCW 9A.46.060 (33).

after this man was chased by the girl's father, he continued to park in the same place near her home. These facts are sufficient to elicit fear that is objectively reasonable.

103 Wn. App. at 7. This behavior had “scared” the young victim (*Id.* at 3) and no more evidence than this was required to support conviction. Similarly, in the present case, Montoya persisted in his contacts with Amy Stormo even after being told not to bother her or her family. And, as in *Ainslie*, Amy Stormo need not point to a specific threat or predict what sort of injury Montoya might cause in the future. It is sufficient that Montoya harassed her causing her significant distress—fear—under circumstances where that fear and distress were reasonable. Moreover, the question of the credibility of Amy’s fear is for the jury to decide, not the trial court or the appellate court. *See State v. Whittaker*, 192 Wn. App. 3295, 409, 367 P.3d 1092 (2016).

As Montoya concedes, Amy Stormo repeatedly testified to her fear and her attempts to ameliorate the same by seeking protective orders against Montoya. Brief at 16. And, the question is in fact about her fear because that is the element of the offense, not some particular future behavior or particular threat of bodily injury. The stalking statute is intended to allow relief to a victim like Amy Stormo before her stalker escalates his behavior into actual assault or bodily injury. On this record, Amy Stormo’s fear was established and the jury decided that the fear was reasonable. Montoya’s claim fails.

IV. CONCLUSION

For the foregoing reasons, Montoya's conviction and sentence should be affirmed.

DATED April 10, 2017.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'JL Cross', written over the printed name of John L. Cross.

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